IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 117

ROSARIO MANCUSO,

Appellant,

— against —

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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MOTION TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, entered March 13, 1959, which unanimously affirmed, without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on Decem-

ber 9, 1958 (949).* That Court in turn had unanimously affirmed, with an opinion by Bastow, *J.* (985, *et seq.*; and see Jurisdictional Statement, Appendix, page 13), an order of the Supreme Court of New York County, entered August 12, 1958 (52b). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing appellant to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting" which had been held in New York at Apalachin, Tioga County. On April 16, 1959, the Court of Appeals amended its remittitur upon appellant's application so as to define the precise questions considered (Jurisdictional Statement, page 1).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August 1958. In the New York courts the appeals of all seven were consolidated. Appellant and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date, Michele Miranda and Joseph Riccobono, two of the other six persons so incarcerated, separately have petitioned this Court for writs of certiorari to the New York Court of Appeals to review the decision affirming their commitments. Miranda's Petition was docketed on May 5; Riccobono's on May 20. A fourth, Paul Castellano, separately has filed both a notice of appeal and a peti-

* Numerals in parentheses refer to folio numbers in the consolidated record on appeal.

tion for a writ of certiorari for review of the New York Court of Appeals decision affirming his incarceration. Both were docketed on May 22. An application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

On June 29, 1959 this Court denied the three petitions for writs of certiorari. 27 U. S. L. W. 3368 (June 29, 1959). The Commission's Motion to Dismiss Castellano's jurisdictional statement is still pending as the time period for Castellano's reply to the motion has not yet elapsed.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission.

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administra-

tion of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.

"This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

"Section 2(1)(a). The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*

"(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

"(c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions are set forth in the Appendix to this Motion at pages 25 to 26.

The pertinent statutory provisions are set forth in the Appendix to the Jurisdictional Statement at pages 27 to 31.

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who reside in various sections of this country and abroad. Appellant and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicate extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for this purpose commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by

which appellant and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.*" (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including appellant (191, 282, 382, 478, 588). The statement read, in part, as follows:

> "*In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public

officials or any other crimes, were committed or planned at this meeting.

"Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (279).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Appellant's Conduct Before the Commission.

An individual hearing was held for appellant before the Commission. A similar pattern of events occurred regarding appellant and the other witnesses during their respective Commission hearings.

Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g. 277; 754).

Questions were directed to appellant by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (287-297). Other than merely identifying himself (284-286), appellant refused to answer these questions (287-297). His

refusals were based on his privilege against self-incrimination (287-297).

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon appellant and the others (299-301). Appellant's attorney questioned the Commission's power to grant immunity on several grounds but his objections were overruled (301-323). The Commission's action and the effect of its decision regarding immunity were clearly explained to appellant, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (315-318).

After this instruction the same questions were repeated by the Commission (324-348). As did the others, appellant again refused to make any answer on the basis of the privilege against self-incrimination (325-349).

On behalf of the Commission the Chairman then specifically directed and ordered appellant to answer the questions as they were put to him (325-349). Appellant nevertheless persisted in his refusal to answer (326-349).

After appellant had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (350).

The Hearings in the Trial Court.

After appellant's separate hearing was adjourned by the Commission pending further proceedings, an order was obtained and served personally on appellant directing him to appear before the New York Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Appellant was the second recalcitrant witness to appear before Mr. Justice Spector, then sitting in the motion part of the trial court, to explain his refusal to testify. Another witness was heard and committed before appellant on August 12.

The trial court offered appellant full opportunity to explain why he had refused to testify. Appellant's counsel first chose to appear specially (762). Afterwards, however, he took complete advantage of the opportunity given him to make extensive argument and factual representations on the merits (765-785). Furthermore, the witness who preceded appellant had fully raised the same legal objections that appellant raised, and now raises, and the same judge who committed appellant had heard and passed upon these arguments (682-750). Appellant's counsel was present, and heard arguments made at the judicial hearing of the prior witness.

Prior to appellant's judicial hearing, the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. Adequate time was set aside by the Court to allow for

reading of the transcript before the commencement of appellant's judicial hearing (753). The Court stated its findings were based on a study of the transcript (786-787), which was very short and easily understood. After full argument as described above, the Commission's application was granted by the Court (787), and the warrant executed.

* * * * *

Since his commitment, appellant has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court, or to the present, has appellant given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him, appellant may secure his release pursuant to law (e.g. 52b [order], and 115 [warrant]).

Summary of Argument

As to Jurisdiction:

Appellant claims his appeal lies to this Court as of right, pursuant to Title 28, United States Code, Section 1257(2). There is no jurisdiction for such an appeal for several reasons:

POINT I

Appellant's Points II and V are not reviewable by this Court under Section 1257(2) or any other provision since they were never raised or passed upon in the New York courts, an essential jurisdictional requirement. Accordingly, this Court has no jurisdiction under any circumstances to review the arguments made under those Points.

POINT II

As respects his Points I, III, IV and V, appellant failed to show in his Jurisdictional Statement that he challenged below a state statute on the ground it was repugnant to the United States Constitution, treaties or laws. On this entirely different ground, therefore, appellant's asserted jurisdiction as a matter of right under Section 1257(2) is defective. Appellant's Point V, it should be noted, is jurisdictionally defective in this respect as well as that set forth above.

As to the Merits:

POINT III

There is no substance or merit to any of the five contentions appellant makes in his Jurisdictional Statement. Should this Court find no jurisdiction for appeal as of right, it should also refuse to grant certiorari because of the lack of substance in appellant's contentions. Should this Court find jurisdiction for appeal as of right as to any one of appellant's five points, it should affirm the decision of the New York Court of Appeals on the merits as to such point.

ARGUMENT

AS TO JURISDICTION:

POINT I

Appellant's Points II and V were not raised or passed upon in the state courts and are not reviewable by this Court.

1. **Appellant's Point II:**

In Point II of his Jurisdictional Statement appellant alleges Chapter 989 of the 1958 New York Laws, Section 7051, *et seq.*, New York Unconsolidated Laws (the Act creating the Commission), contravenes the Fourteenth Amendment to the United States Constitution in that it grants the Commission "ill-defined and omnipotent powers."

But the papers properly before this Court fail to reveal this issue was raised below. The transcripts of appellant's hearings, both before the Commission and the trial court, contain no reference to such an issue either expressly or by implication. In fact at no time during either of these hearings was the Fourteenth Amendment to the United States Constitution even mentioned. The Appellate Division opinion, similarly, is devoid of reference to the alleged issue.

The only colorable basis for appellant's allegation that this particular Fourteenth Amendment issue was raised below is the amended remittitur of the New York Court of Appeals. Amendment of the remittitur actually was made by the Clerk of that Court before the Commission had been notified of the nature of appellant's proposed amendments. But as so amended, it reads in part:

> "Upon the appeal herein on behalf of the appellant Maneuso there were presented and necessarily passed upon the following questions, viz.:
>
> * * * *
>
> "2. Whether the law creating the Commission of Investigation is unconstitutional so as to grant ill-defined and omnipotent powers to the Commission."

This amended remittitur is insufficient as a basis for appeal. It is essential to jurisdiction in this Court that appellant demonstrate the record on appeal "either expressly or by clear intendment" reveals a federal issue was raised in the state courts. *People of the State of New York* v. *Zimmerman*, 278 U. S. 63.

67 (1928). This Court there stated that if the record on appeal "left uncertain whether the claim of invalidity was grounded upon some provision of the State Constitution or some provision of the Constitution of the United States, or on both . . . there plainly would be no basis for review in this Court." (p. 68). This is exactly the defect in appellant's reliance on the amended remittitur, which fails to state whether or not the United States Constitution, or any section thereof, are the bases for his claim of unconstitutionality. As *Zimmerman* made clear, in such cases this Court will presume the decision below was based upon a challenge under the State Constitution. To the same effect are: *Bowe* v. *Scott*, 233 U. S. 658 (1914); *New York Central & H. R. Co.* v. *New York*, 186 U. S. 269 (1902).

In addition, appellant's briefs in the New York courts strongly support the presumption that his challenge to Chapter 989 was made only in reference to the New York Constitution and not the United States Constitution. The only constitutional reference in his briefs on this point is to Article III, Section 1, of the New York State Constitution, which provides all legislative power shall be vested in the State Senate and Assembly. Appellant's argument on this point appears to be that the delegation of "omnipotent and ill-defined powers" to the Commission violates the principle of separation of powers embodied in Article III, Section 1, of the New York State Constitution. The New York courts gave no credence to this argument and decided there was no violation of the doctrine of separation of powers under the New York Constitution. That decision is the final word on this entirely state issue since there is no federal consti-

tutional requirement that a state adhere to the principle of separation of powers. *Dreyer v. Illinois*, 187 U. S. 71 (1902).

Appellant's Point II is further defective jurisdictionally in that it fails to set forth the specific provision or provisions of Chapter 989, the Act establishing the Commission, which he challenges on constitutional grounds. *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 41 (1901). This Act is composed of 13 different sections, together with numerous subsections, most of which are in no respect applicable to this proceeding. Section 7051, *et seq.*, New York Unconsolidated Laws. Vague and unspecified claims of unconstitutionality obviously can provide no basis for jurisdiction in this busy Court.

2. **Appellant's Point V:**

In Point V of his Jurisdictional Statement appellant alleges that by his commitment he has been deprived of his right to assembly freely in contravention of the First and Fourteenth Amendments to the United States Constitution. Here too, appellant's jurisdiction is fatally defective since the record before this Court fails to reveal this issue was raised below. There is no mention of this issue in the transcripts of appellant's hearings before either the Commission or the trial court, nor is this issue discussed in the opinion by the Appellate Division. The Court of Appeals' remittitur contains no reference to this issue. Omission of this issue from the amended remittitur is especially significant since appellant's proposed amended remittitur specifically requested that

this issue be included. The Court of Appeals, however, refused to do so. There is absolutely no basis on which appellant can contend that this issue was raised and passed upon by the courts of the State of New York.

POINT II

Appellant has failed to show that the New York Statutes he now claims are repugnant to the United States Constitution were so attacked and passed upon below and, therefore, appellant cannot meet the jurisditional requirements for appeal as a matter of right as to his Points I, III, IV and V.

1. Appellant's Points I and III:

The Commission's arguments with respect to the jurisdictional defects of appellant's Points I (alleged deprivation of a fair hearing) and III (an attempted revisitation of the holdings in *Knapp v. Schweitzer*, 357 U. S. 371 (1958) and *Mills* v. *Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959)) are set forth at pages 11 to 13 of the Commission's Motion to Dismiss the appeal of Paul Castellano (Oct. Term 1959, No. 72).

2. Appellant's Point IV:

In his fourth "Question Presented" appellant contends Section 406 of the New York Civil Practice Act is repugnant to the Eighth Amendment to the

United States Constitution in that it sanctions or may be the vehicle for incarceration under an "indefinite term." The question so phrased purports to qualify for appeal pursuant to Title 28, United States Code, Section 1257(2), which requires a showing that a state statute was challenged in the courts below as repugnant to some provisions of federal law. The amended remittitur of the New York Court of Appeals fails to disclose however, that the question he now poses was necessarily passed upon in the New York courts; it contains no indication of which New York statute is or was attacked. The circumstances under which the remittitur was amended are related above (p. 13, *supra*). The remittitur reads, in pertinent part, as follows:

> "Upon the appeal herein on behalf of the appellant Mancuso there were presented and necessarily passed upon the following questions, viz.:
>
> * * * *
>
> "4. Whether appellant Mancuso was deprived of his liberty for an indefinite time in violation of the Eighth Amendment to the United States Constitution."

For all that the amended remittitur reveals, the Court of Appeals could just as well have disposed of appellant's contentions by merely holding the Eighth Amendment to the United States Constitution inapplicable to state proceedings. Such a holding would not involve passing on the repugnance of a state statute to federal law. Appellant has not, and cannot, demonstrate that the New York Court of Appeals did not so hold.

As will be demonstrated below, appellant's underlying premise that the Eighth Amendment applies to the states is so frivolous and without merit as to make it probable that the Court of Appeals did, in fact, dispose of this argument by appellant through swiftly rejecting this underlying premise. Because appellant cannot show that the Court of Appeals necessarily passed upon the alleged repugnance of Section 406 to the Eighth Amendment, there can be no appeal as a matter of right.

3: **Appellant's Point V:**

In Point V of his Jurisdictional Statement appellant alleges that by his commitment he has been deprived of his right to assemble freely in contravention of the First and Fourteenth Amendments to the United States Constitution. Even if this issue had been raised in the New York courts (and the Commission has demonstrated above that it has not), it would not present a question reviewable as a matter of right under Section 1257(2), for it fails to contain the mandatory assertion that a state statute was attacked below as repugnant to the right to assemble freely which is granted by the First and Fourteenth Amendments to the United States Constitution. Indeed, appellant cites no statute whatsoever in his argument.

AS TO THE MERITS:

POINT III

In addition to the jurisdictional defects described above, the questions raised by appellant are not substantial and do not warrant consideration by this this Court.

1. **Appellant was accorded full due process protection during this proceeding (Appellant's Point I).**

The Commission's argument on this point is set forth at pages 16 to 19 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (October Term, 1958, No. 893).

There are minor factual differences between the trial court hearings of appellant and Miranda. These differences, however, do not affect the legal position of either. They have not been denied full due process protection, and their claims concern minutiae of state civil procedure which have been decided unanimously against them by the appropriate forum—the state's highest courts. Miranda is precluded from successfully establishing a due process claim because of his deliberate waiver of his right to contest on the merits by virtue of his special appearance. On the other hand, after first stating he was appearing specially, appellant chose to avail himself of his opportunity for a hearing. He made extensive legal argument and offered factual representations; that they did not

persuade and are not substantial is not a deprivation of due process.

Appellant's argument before the trial court makes it perfectly clear that the sole purpose of his requested adjournment was to enable him to "prepare a brief [and] submit it on this order to show cause" (768). Denial of an adjournment, in the exercise of the trial court's discretion, hardly amounts to a deprivation of due process protection under such circumstances.

Moreover, there can be no serious claim of deprivation of rights on the ground of surprise for two additional reasons. At the hearings appellant was represented by counsel and came fortified with prepared legal statements drawn in advance of the hearings, as did Miranda. Similarly, appellant's attorney attended the prior proceeding which resulted in the commitment of a recalcitrant witness, thereby apprising himself of the legal consequences which might, and did in fact, result from his client's refusal to testify. Appellant consciously and stoically made his choice with full knowledge: he was bound to defy this lawful inquiry and the Court even if it meant his imprisonment. No amount of rhetoric can avoid that obvious truth.

2. The State Act establishing the Commission is not in conflict with the Fourteenth Amendment to the United States Constitution (Appellant's Point II).

As already demonstrated, appellant has not, and indeed cannot, demonstrate the New York courts passed upon the federal question he alleges in Point II of his Jurisdictional Statement: that the Act establishing

the Commission is unconstitutional as it "violates the Fourteenth Amendment" to the United States Constitution. But even if appellant could demonstrate the New York courts had passed upon this question, his appeal as to Point II must be dismissed. This is so for two reasons: First, because contrary to the principle enunciated by this Court in *Barenblatt* v. *United States*, 27 U. S. L. W. 4366 (June 8, 1959), appellant's refusal to answer before the Commission was not grounded upon an objection to the alleged "omnipotent and ill-defined" delegation of power to the Commission; rather, the first time this particular objection was ever mentioned was at the appellate level. Second, no objection based on *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), can be raised here since appellant knew exactly the nature of the Commission's inquiry. He was clearly advised of the subject matter of the hearing by a subpoena served upon him, the Commission's resolution, and the Commission's opening statement at the hearings; the questions were simple and direct; *Sweezy* also has no applicability since the Commission is a fully independent state agency, not an arm of the New York State Legislature, and therefore no problem of the separation of power from responsibility to hold hearings is presented.

3. Appellant's rights against compulsory self-incrimination under the United States Constitution were not infringed and cannot be prejudiced by this State proceeding (Appellant's Point III).

The Commission's argument on this point is set forth at pages 14 to 15 of its Motion to Dismiss the appeal of Paul Castellano (Oct. Term, 1959, No. 72).

4. Appellant's confinement until he complies with a lawful court order does not abridge his rights under the Eighth Amendment to the United States Constitution. (Appellant's Point IV).

It is settled that the Eighth Amendment to the United States Constitution does not extend to the states or state proceedings. *Pervear* v. *Massachusetts*, 72 U. S. (5 Wall.) 475 (1867); *In re Kemmler*, 136 U. S. 436 (1890); *accord*, *Knipp* v. *Schweitzer*, 357 U. S. 371 (1958), footnote 5 at 378.

Petitioner's contention that his incarceration under Section 406 amounts to cruel and unusual punishment is also specious. Petitioner himself determines his time of release, for all he need do is testify truthfully and responsively to comply with the order of the court. *People ex rel. Valenti* v. *McCloskey, Sheriff, and Commission of Investigation*, 8 A. D. 2d 74, N. Y. S. 2d (1959), *aff'd*, N. Y. 2d (July 8, 1959). Incarceration where one may be released at any time by telling the truth is not "cruel;" incarceration for refusal to comply with a lawful order of a court is not "unusual;" and, a coercive order under Section 406 is a time-honored civil remedy and not "punishment." *Maggio* v. *Zeitz*, 333 U. S. 56 (1948); *Oriel* v. *Russell*, 278 U. S. 358 (1929); *Beeres* v. *Crowenshield*, 162 Misc. 148, 292 N. Y. Supp. 756 (1936), *aff'd*, 274 N. Y. 74, 8 N. E. 2d 283 (1937); *J. R.* v. *M. P.*, Y. B. 37 Hen. VI f. 13, pl. 3 (C. Common Pleas 1459) (set out in Field & Kaplan, Civil Procedure (1953), pp. 268-270). As to this point, see also the Commission's argument set forth on pages 5 to 6 of the Commission's Brief in Opposition to the Petition for a Writ of Certiorari of Paul Castellano (Oct. Term, 1958, No. 940).

5. Appellant's Right to Assemble Freely, as Guaranteed by the First and Fourteenth Amendments to the United States Constitution, has not been abridged (Appellant's Point V).

Appellant contends the Commission's investigation of the "Apalachin Meeting," and its inquiries of him in the course of that investigation, somehow abridged his right of peaceable assembly as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This contention is utterly frivolous. The Commission was not in existence at the time of the Apalachin Meeting at Mr. Barbara's home and could not have taken steps to impede appellant's presence at that meeting. All it is attempting to do now is make inquiry concerning that past event. In addition, there has been no indication that inquires of this nature will prevent appellant from similar activity—a choice which is appellant's alone. Thus, no action of the Commission has abridged this right of appellant's.

The right to assemble is not absolute at any rate, and there can be no doubt a State has the right to make inquiry of a particular and highly suspect meeting in aid of its fundamental police powers. Certainly it has the right merely to inquire as to the organization and nature of that meeting.

Conclusion

Appellant's Points II and V were not raised in the state courts and should not be reviewed in this Court.

No showing has been made as to appellant's Points I, III, and IV, and V as well, that he challenged a state statute below as repugnant to the United States Constitution, treaties or laws. As to those points, the jurisdictional requirements for appeal to this Court as a matter of right under Title 28, United States Code, Section 1257(2), have not been satisfied and the appeal, in its entirety, should be dismissed.

The federal questions raised by appellant are not substantial and, in the alternative, if jurisdiction for appeal is found, the decision of the New York Court of Appeals should be affirmed in all respects. If jurisdiction for appeal as of right is not found certiorari should be denied.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Cited in the Jurisdictional Statement and the Motion to Dismiss.

UNITED STATES CONSTITUTION

1. *Amendment I*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. *Amendment V*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. *Amendment VI*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. *Amendment VIII*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. *Amendment XIV*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION

Article III, Section 1

"Section 1. The legislative power of this State shall be vested in the Senate and Assembly."